TEA HOCK CHONG

v.

RAZALI HANAFIAH

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. P135 OF 1985]
29 NOVEMBER 1989

TORT: *Negligence - Traffic accident - Claim for personal injuries - 'Silent' evidence such as police sketch plan - Photographs of no help - Reliance on oral evidence - Two completely conflicting versions - Credibility of witnesses.*

An accident took place along a stretch of road leading from Tanjong Karang to Kuala Selangor. The vehicles involved were a motor cycle and a motor car. The plaintiff was a pillion rider on a motor cycle, which was attempting to overtake a motor lorry in front, and at that moment, the defendant's motor car, which was coming from the opposite direction, knocked into the motor cycle.

This was a case where the 'silent' evidence such as the police sketch plan, photographs and police reports did not afford much assistance. The learned Judge had to rely solely on oral evidence.

The plaintiff and defendant gave two completely conflicting versions. As such, the learned Judge had to spend much time in scrutinising the evidence of the witnessess so as to be able to reach a fair and just decision.

Held:

[1] The defence contention that the plaintiff was the rider of the motor cycle was rejected.

[2] Both the defendant and rider of the motor cycle were equally to be blamed for the accident. However, the liability of the defendant *inter se* the plaintiff remained at 100%.

[3] A summary of the awards under the various heads of damages is as follows:

(1)	Pain and suffering and loss of amenities	- RM50,000
(2)	Costs of replacements of artificial limb and replacements of its component parts	- RM 31,950
(3)	Actual loss of earnings	- RM 27,000
(4)	Future loss of earnings	- RM 52,400
(5)	Special damages	- RM 2,370
	Total	RM163,720

The awards in respect of actual loss of earnings and special damages shall carry interest of 4% from the date of the accident to the date of the judgment. No interest is awarded to the remaining awards. The plaintiff is entitled to costs of this proceeding.

[Order accordingly.]

Cases referred to:
Khoon Chye Hin v. PP [1961] 27 MLJ 105
Balasingham v. PP [1959] 25 MLJ 193

For the plaintiff - S. Nair; M/s. Lawrence Dhillon & Associates
For the defendant - Patma Singh; M/s. V.P. Nathan & Partners

JUDGMENT

Lim Beng Choon J:

An accident took place at about 6.30 p.m. on 15 April 1983 at the 6 m.s. along that stretch of road leading from Tanjong Karang to Kuala Selangor. The vehicles involved were a motor cycle bearing registration no. WAT 1235 ('the motor cycle') belonging to the plaintiff and a motor car bearing registration no. KH 60 ('the motor car') belonging to the defendant.

At the outset I must mention that this is one of the unusual cases where the 'silent' evidence such as the police sketch plan, photographs and the respective reports lodged by the rider of the motor cycle and the driver of the motor car does not afford very much assistance to me to enable me to arrive at a proper decision. I therefore, have to rely substantially if not solely, on the oral evidence adduced at the trial in my determination of this case. It is not surprising that the evidence of the witnesses has brought about two completely conflicting versions of how the accident took place. In the result I have to spend much time and exercise in scrutinising the evidence of the witnesses with the greatest care so as to be able to reach a fair and just decision.

The plaintiff's version is this: On the evening in question, he had to travel from his house at Batu Lima, Tanjong Karang road to Tanjong Karang town. His purpose of going there was to catch a taxi to his place of work at Kapar, Klang. He, therefore, asked one Lee Mong Loong, to ride his motor cycle while he himself sat on the pillion for the journey to the town. When they were about to reach the 6 m.s. they saw a motor lorry in front of them travelling in the same direction. After following the motor lorry for a little while, the driver of the motor cycle decided to overtake the motor lorry. He, therefore, moved nearer to the central white line in order to see whether he could safely overtake the motor lorry. He had not begun to overtake yet and his motor cycle had not gone past the central white line. At that moment the defendant's motor car, which was coming from the opposite direction, knocked into the motor cycle. The version of the plaintiff was substantially confirmed by his 'star' witness, Lee Mong Loong, PW3 who claimed to be the rider of the motor cycle but, as can be seen later, this was vehemently disputed by the defence. However, that may be, PW3, at the request of the Counsel for the defence, demonstrated the point of impact between the two vehicles. It showed the off-side front mudguard of the motor car grazing the right side of the front wheel of the motor cycle thereby forcing it to turn slightly to the left whereupon the motor car proceeded to knock against the centre part of the motor cycle. I should also mention that the Counsel for the defence suggested to the two witnesses that it was the plaintiff who was riding the motor cycle at the material time and that PW3 was never involved in the accident to which both the witnesses denied.

The defendant on the other hand, put his version in this way. On the evening in question he was proceeding to Kapar. He had three friends with him in his motor car and he was driving it. They were going to Kapar to attend a wedding. Nearing the 6 m.s. Tanjong Karang road, there was a motor lorry approaching his car from the opposite direction. When he was about to pass the oncoming motor lorry, a motor cycle ridden by the plaintiff suddenly came out from the rear of the motor lorry and knocked against his motor car. It happened so suddenly that the defendant could not avoid the accident although he did swerve his car to

his left. He was asked by his Counsel to demonstrate to this Court the point of impact. It showed that he had not yet passed the motor lorry when the motor cycle came from behind the said lorry and knocked into the right end of his car bumper. The right side of the front wheel of the motor cycle hit the said bumper and went on to graze the car before it fell on the road.

Since the issue as to who was the rider of the motor cycle at the material time was strongly disputed, it is not unusual for the Counsel for the plaintiff, in the cross-examination, to spend some time in trying to discredit the defendant and to suggest to the latter that his assertion about the plaintiff being the rider was an after-thought. In order that one can follow the relevancy of the questioning of the Counsel and the defendant's response, it is necessary to set out the manner in which the solicitors for the defence had formulated the defence. When the original statement of defence was filed in April 1985, it was averred that "the collision was solely caused or substantially contributed to by the negligence of the rider of motor cycle no. WAC 1235, one, Tea Hock Siang" and particulars of the negligence of Tea were given. On 17 October 1986, the defendant, with leave of this Court, issued a third party notice against Tea to claim indemnity and contribution. A month later an application was made and allowed by consent to amend the statement of defence to replace the rider's name with the name of PW3, Lee Mong Loong. Pursuant to an order of the Court dated 7 July 1987 the third party notice was also amended to substitute this Lee as the third party. On 27 October 1988, the amended statement of defence was amended one more time and in the re-amended statement of defence, it was averred that the rider of the motor cycle was in fact the plaintiff.

Reverting to the cross-examination of the defendant pertaining to the controversy over the rider of the motor cycle, the defendant admitted that he did make a statement to his insurance company a few days after the accident. In that statement he had informed them that there was only one person on the motor cycle and that person was the plaintiff who was riding it. He, however, asserted that he had no knowledge as to the manner in which the solicitors of the insurers had formulated his defence. He also admitted that until the hearing of this case he had not been summoned to give evidence in any Court about the accident, neither had he given any evidence in Court. He denied that his assertion about the plaintiff being the rider was an after-thought and in re-examination he identified the plaintiff as the driver of the motor cycle.

To substantiate the defendant's evidence, one Kamaruddin bin Marsidan, was called (DW2) to testify for the defence. DW2, a senior technician attached to the Telecommunications Department, claimed to have witnessed the accident. He said that he was at the material time driving his departmental van and that he was following the defendant's car for about 1 to 1½ miles prior to the accident. He was about 40' to 50' behind the said car when he was approaching the 6 m.s. While he was waiting to overtake the motor car, he saw the plaintiff's motor cycle suddenly came out from the rear of the oncoming motor lorry and crashed on to the motor car. Thereupon the motor cycle and its rider fell behind the motor lorry. He then stopped his van to help the injured rider. He said he could identify the injured rider and he pointed at the plaintiff as the person who rode the motor cycle. Under cross-examination the witness said that the solicitor for the defendant contacted him by telephone only some time in December 1988 to request him to come to his Court to testify. The defendant himself met him for the first time in 1987 although the former had telephoned him earlier. He was, however, very sure that between April 1983 to 1986 no one had contacted him or discussed with him about the accident. He also admitted that he had not made any report or statement to the police about the accident. Later in the cross-examination he resiled and claimed that the

defendant came to his house with a motor mechanic on the night of the accident and talked to him about the accident. In re-examination he claimed that the defendant was able to find his house that night because "a local mechanic who knew me might have told him." When asked whether he knew the defendant prior to the accident he answered 'no'; neither had he given his personal particulars to the defendant before he left the scene of the accident.

I shall deal with the issue relating to the rider of the motor cycle first since this issue is very crucial and has a significant bearing on the case. In my consideration of this issue, I have in the first place observed that PW3 had lodged his police report on 16 April 1983, that is to say just one day after the accident. In that report he had not only named himself as the rider but he had also given a brief account of how the accident happened. If he were not involved in the accident and were never at the scene when the accident occurred, he could only have stated what were contained in his report after he had obtained the necessary information concerning the accident from either the plaintiff or someone who had seen how the accident happened. There is no evidence to support a finding that PW3 had obtained the necessary information from another person who had witnessed the accident. As to the possibility of PW3 getting the necessary information from the plaintiff, it must be borne in mind that the injuries sustained by the plaintiff were so severe that he was rendered unconscious for quite some time after the accident. The plaintiff was, therefore, in no position to recount to PW3 the events leading to the accident to enable the latter to lodge his report the day after the accident. I have also taken note of the fact that there is nothing in the evidence to show the reason for PW3 to take upon himself to lodge a false report. Had the plaintiff been riding the motor cycle without any RIMV licence at the material time, one could perhaps accuse PW3 for trying to shield him particularly when he is a close friend if not a relative of PW3. But nothing of this sort happened here as the plaintiff had a valid RIMV licence albeit a 'L' one to ride the motor cycle. It may be argued that when he lodged the report, PW3 had in mind the institution of this action and that he was aware that if he assumed liability the plaintiff would have a better chance of success in his claim for damages. This proposition is best stated and be rejected simply because such a proposition pre-supposes that PW3 must have a sound knowledge of the law relating to the nature and scope of third party proceeding. In the third place the explanation given by the plaintiff as to why he called upon PW3 to ride the motor cycle, which belonged to him, is certainly not incredible.

With regard to the defence evidence to rebut the matter relating to the rider, I must say that it does not impress me at all. Firstly the defendant had in his evidence stated that soon after the accident, he had given a statement to his insurers in which he had informed them that there was only one person on the motor cycle and that person was the plaintiff who was riding it at the material time. If that be so, that information would have been conveyed to the solicitors who handled this case. It is true that in the original statement of defence filed in April 1985 the plaintiff was named as the rider of the motor cycle. But one year later the statement of defence was amended by naming Lee Mong Loong as the rider. Then some two years later came another amendment to replace the plaintiff's name as the rider. These shiftings are sufficient to cause to question the assertion of the defendant for if he had, as he said, never mentioned to his insurers anybody else as the driver except the plaintiff one wonders how did the name Lee Mong Loong creep into the amended statement of defence. No evidence was led to explain such a change. Secondly no explanation was given by the defendant as to how and when he came into contact with DW2 and became aware that this person had witnessed the accident. His failure to give an explanation is significant bearing in mind that the evidence of DW2 on this point is vulnerable to criticism. In this connection one may recall that DW2 had earlier said in his evidence that the first time when the

defendant contacted him was some time in late 1986. He resiled from this assertion later by saying that the defendant contacted him on the night of 15 April 1983. This shifting of his evidence demonstrates that he is not a reliable witness and as a matter of prudence his evidence must be scrutinised with great care (see *Khoon Chye v. PP* [1961] 27 MLJ 105 and 107). Upon a careful scrutiny of his evidence I am not at all satisfied that the defendant could have visited him on the night of the accident since the defendant was, as he had said, a complete stranger and that he had not given his personal particulars to the defendant at any time. His explanation regarding the possibility of a local mechanic helping the defendant to locate him is pure conjecture. Furthermore had the defendant seen him on the night in question one could have no doubt that the defendant would have informed his insurers accordingly. It must also follow that the insurers would have through their solicitors contacted DW2 if not immediately at least a few months later. It is incredible that the said solicitors would have waited until December 1988 to get in touch with him. In any event DW2 had not thought it fit to lodge a report with or to give a statement to the police. As a senior government servant and in the circumstances of this case one would have expected him to do so.

In her submission the learned Counsel for the defence suggested that PW3 was an unreliable witness in that PW3 had firstly stated in his report to the police that the plaintiff was a mere friend when it was brought out in his evidence that the plaintiff was and still is his brother-in-law. The short answer to this contention is that there is no evidence to show as to when PW3 became the brother-in-law of the plaintiff. PW3 should have been questioned on this point. At any rate the name of the plaintiff had appeared in the said police report as the person who was riding pillion. Secondly Counsel said that as the first impact was on the off-side handle of the motor cycle it was incredible that PW3 could have escaped without sustaining any injury to his hand had he been the rider. With due respect to Counsel, PW3 had never claimed that he had suffered no injury. What he said in cross-examination was that his right hand was 'grazed' but he did not seek treatment as the grazing only caused slight abrasion on his right hand. Indeed his evidence is consistent with the description of his injury in his police report where he said: "Saya mendapat sedikit luka di bahagian tangan kanan." In any event from the demonstrations carried out by both PW3 and the defendant, I have no doubt that when the collision occurred the front wheel of the motor cycle was hit first by the offside bumper of the motorcar causing the motor cycle to make a turn to its left before the motorcar went on to hit it broadside. This accounts for the grazing injury to the plaintiff's right hand. Thirdly, Counsel contended that there was a serious inconsistency in the evidence of PW3. She said that this witness had asserted that the motor lorry was carrying red earth and this assertion could not be reconciled with the assertions of PW2 and DW2 who said that the motor lorry was carrying bottled drinks. Again with due respect, PW3 did not positively say that the said lorry was carrying red earth - he merely thought that that type of lorry, which he described as a 6-wheel lorry would usually carry red earth. In any case on my analysis of the evidence of PW3, it goes to show that at the material time he was trying to see whether the road ahead was clear of traffic in order to overtake the motor lorry; he did not pay much attention to what the said lorry was transporting. Finally Counsel drew my attention to the relationship of PW3 and the plaintiff and contended that since the two persons were and still are related, PW3's evidence should not be accepted. Furthermore, so said learned Counsel, it was incredible that PW3 would have left the scene of the accident without bothering to check the condition of the injured plaintiff or to see that he was removed to hospital. Let us examine what PW3 had to say on this point. After the accident PW3 said that he felt a bit drowsy. A person who stayed around the locality offered to take him home and he accepted the offer. PW3's house was located at about one

or two miles from the scene and he accepted the offer after he was assured that the injured plaintiff had been taken to the hospital. I do not think there is anything unusual with the behaviour of PW3 considering that at the material time he must be in a state of shock and would be eager to go back to his house since there was nothing he could do for the injured plaintiff. As to the contention that PW3 was and still is related to the plaintiff, it has been said that there is no legal presumption that an interested witness should not be believed. PW3's evidence is therefore entitled to some credence when there is no cogent reason for disbelieving him - see *Balasingham v. PP* [1959] 25 MLJ 193.

In the ultimate analysis of the evidence as a whole, I am satisfied that DW2 did not see how the accident occurred. He might have been at the scene of the accident on the day in question but he arrived there after the accident had taken place. Upon arrival at the scene he saw only the more severely injured plaintiff and the motor cycle. He therefore formed the impression that the injured plaintiff was the rider. He was unaware of the presence of PW3 either because by that time PW3 had left the scene or someone was about to take him home. As regards to the defendant, he could not have a clear and unobstructed view of the motor cycle considering that it was at all material times following behind the motor lorry which must have prevented it from being clearly seen by the defendant. In the result the defendant could not be sure whether the motor cycle was carrying one or two persons. It was only later that DW2 was able to convey the impression formed by him to the defendant and convinced the latter that the plaintiff was the sole rider of the motor cycle. This accounts for the drastic change in the defence in late 1988.

For the reasons as stated above, I have no hesitation in rejecting the defence contention that the plaintiff was the rider of the motor cycle and hold that the rider was PW3, Lee Mong Loong.

Turning to the question of liability, I have no doubt that at the material time PW3 was thinking of overtaking the motor lorry. He therefore moved his motor cycle very near to the central white line in order to see whether it was safe for him to overtake the said lorry. He had not, however, started to overtake the said lorry yet; neither did his motor cycle encroach on to the right half of the road. This finding is fortified by the statement made by the defendant in his police report where he had made no complaint about the motor cycle encroaching on to the wrong half of the road. I also find as a fact that the motor lorry was at the material time travelling at a distance of one foot from the central white line. I cannot accept the defendant's evidence relating to the distance of his motor car from the central white line which he claimed was between 4' to 5' for if that be so there would be a space of 5' to 6' between the motor lorry and the motor car in which case the motor cycle, which could not be more than two or two and a half feet wide, would have been able to overtake the said lorry without any mishap. The defendant at any rate admitted that his assessment of the distance was based on his own estimation and I have no doubt that in the circumstances of this case his estimation was erroneous. That being the case, his evidence on this point has no value whatsoever. Bearing in mind that the accident would not have occurred unless the defendant was also travelling very near to the central white line, I therefore have no hesitation in holding that that was in fact what happened. In the result, I must hold that both PW3 and the defendant committed almost the same negligent acts of failing to keep a proper look-out, and failing to drive their respective vehicles on the correct side of the road so that they would each pass the other safely. It seems to me that they were both hugging the centre of the road and failing to give way to each other. I therefore hold them equally to be blamed for the accident. However that may be, my finding does not in anyway detract the liability of the defendant *inter se* the plaintiff - it remains at 100%. This has been rightly conceded to by the Counsel for the defence.

I shall now deal with the quantum of damages and this will be assessed under the following heads:

(1) Pain suffering and loss of amenities

(2) Costs of the replacements of the artificial limb and its component parts

(3) Actual loss of earnings

(4) Future loss of earnings and

(5) Special damages.

With regard to head (1), the injuries sustained by the plaintiff were fractures of right femur, right tibia and fibula. He had undergone two amputations - an amputation of the right ankle followed a month later by an above-knee amputation of the right leg. He was hospitalised from 15 April 1984 to 14 May 1984 but he had to go for follow-up treatment until 20 June 1984. He was not fitted with an artificial limb until August 1984. An amount of RM50,000 is, I think, a fair one.

As to head (2), a technician of Teh Lin Posthetic & Orthopaedic Co. Sdn. Bhd. testified that the type of artificial limb fitted to the plaintiff could be used only for a period of six years after which it would have to be replaced. Each replacement would cost the plaintiff RM3,300. He also produced a quotation from his company to show the costs of replacement of the component parts of the artificial limb (see Exhibit Pi). My assessment under this head is as follows:

(a) Cost of a 6-yearly replacement of the artificial limb is RM3,300. Bearing in mind that the plaintiff is now 25 years old he will need at least six replacements. The costs of six replacements @ RM3,300 per replacement comes to RM3,300 x 6

-RM19,800

(b) Cost of a 3-yearly replacement of the socket is RM400. Thirteen replacements are necessary. Total cost is RM400 x 13

-RM 5,200

(c) Cost of a yearly replacement of foam cover and tool is RM320. Number of replacements is 40. Amount awarded is RM320 x 40

-RM12,800

(d) Cost of a 6-monthly replacement of cosmetic stocking and rubber bumper is RM30, Number of replacement is 80. Therefore costs of the replacements are RM30 x 80

-RM 2,400

(e) Cost of a 4-monthly replacement of flat rubber valve is RM20. Number of replacements is 120. Therefore costs of replacements of this item are RM20 x 120

-RM 2,400

Total -RM42,600

As the plaintiff will be getting a lump sum in advance a deduction of 25% should be made. The award under head (2) is therefore

-RM10,650

RM31,950

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As to head (3), it is to be noted that the accident occurred on 15 April 1983 and the case was brought on for trial on 13 April 1989. There is therefore an interval of six years. The plaintiff at first claimed that he was earning RM600 monthly. However when he was being cross-examined he admitted that he was a daily paid employee of Lai Li Engineering firm earning RM13 day excluding overtime. He claimed that he was working even on Sundays and public holidays in which case he would get twice that amount. In the circumstances, I find that his monthly earning was RM500. As he was fitted with the artificial limb only in August 1983 and he would require some time before he could adjust himself to walk with the artificial limb, I am satisfied that he was not able to earn anything for a period of 12 months. This works out to RM500 x 12 = RM6000. For the remaining 60 months I will allow his loss at RM350 p.m. and this will come to RM350 x 60 = RM21,000. The award under head (3) is therefore RM27,000.

Now to head (4) - as the plaintiff is now 25 years old and bearing in mind that the normal retiring age is 55 years, 20 years' purchase is appropriate. With a multiplicand of 350 the amount will come to RM52,400.

Finally we have the claim under head (5) for special damages. The plaintiff has not established that he has incurred expenses in respect of the purported visits made by members of his family when he was in hospital; nor had he established that he had incurred expenses to travel to the hospital for the follow-up treatments. There is also no proof that he had to pay for extra nourishing food or to expend money to obtain native therapeutic treatments. Items (1), (4) and (5) of the particulars of special damages are therefore disallowed. As regards to item 3 relating to cost of affixing artificial limb, parties have agreed at a sum of RM2,300. Likewise the parties have agreed that the cost of purchasing medical, police and RIMV reports (item 6) should be RM70. The award under this head is therefore RM2,370.

Now to summarise the awards made under the various heads of damages:

(1) Pain suffering and loss of amenities	- RM 50,000
(2) Costs of replacements of artificial limb and replacements of its component parts	- RM 31,950
(3) Actual loss of earnings	- RM 27,000
(4) Future loss of earnings	- RM 52,400
(5) Special Damages	- RM 2,370
Total	- RM163,720

The awards in respect of actual loss of earnings and special damages shall carry interest of 4% from the date of the accident to the date of the judgment. No interest is awarded to the remaining awards. The plaintiff is entitled to costs of this proceeding.

Also found at [1990] 1 CLJ 833